

**BEFORE THE MERIT EMPLOYEE RELATIONS BOARD  
OF THE STATE OF DELAWARE**

**COPY**

IN THE MATTER OF:	)	
NANCY CALHOUN,	)	DOCKET NO's. 01-08-215,
NANCY CLOUGH, and	)	01-08-216, and 01-08-217
JOHN JOHNSON,	)	DECISION AND ORDER
	)	
Appellants,	)	
v.	)	
	)	
DEPARTMENT OF HEALTH	)	
and SOCIAL SERVICES,	)	
	)	
Employer/Agency.	)	

Before Brenda C. Phillips, Chair; John F. Schmutz, Esquire, Member; Dallas Green, Member; and John W. Pitts, Member, constituting a quorum of the Merit Employee Relations Board ("Board") as required by 29 Del.C. §5908(a).

AND NOW, WHEREAS, the above-referenced matter came before the Board for a public evidentiary hearing on October 25, 2000, the Board hereby makes the following findings and conclusions and enters the following Order upholding the Agency's action and denying the Appellants' appeal.

APPEARANCES

For the Agency:      Ilona M. Kirshon  
                                Deputy Attorney General  
                                State of Delaware, Department of Justice  
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                                Wilmington, DE 19801

For the Appellants: Nancy Calhoun, *pro se*  
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John Johnson, *pro se*  
P.O. Box 452  
Delaware City, DE 19706

### NATURE OF THE PROCEEDINGS

This matter came before the Board pursuant to Merit Rule No. 21.0120 as an appeal after a Step Three grievance decision which was adverse to Nancy Calhoun, R.N. ("Calhoun"), Nancy Clough, R.N. ("Clough") and John Johnson, R.N. ("Johnson"), collectively "Grievants." This grievance concerns the Agency's efforts in February 2000 to attract more candidates to residential institution or 24-hour, 7-day ("24/7") Psychiatric III nurses at a time of a critical shortage. The Agency offered advanced starting salaries to residential Psychiatric III nurses. Grievants contend that the Agency violated Merit Rule 5.0110 by the procedures it used for giving a pay raise only to residential Psychiatric III nurses, and not to all Psychiatric III nurses, including nurses who worked at community mental health clinics. This is the Board's Decision and Order based upon the evidence presented at the hearing.

### SUMMARY OF THE EVIDENCE

Nancy Calhoun was sworn and testified that she is a Psychiatric III nurse, employed at ProAct. She testified that Ms. Clough and Mr. Johnson both work at Canby Park, which operates five days a week. She explained that, unlike Canby Park, ProAct operates seven days a week, with a day shift and an evening shift. She testified that the nurses at ProAct work

holidays. The nurse at ProAct who carries the pager is on call 24 hours to come in. If a ProAct client needed to be hospitalized or if there was a crisis, a nurse had to be there.

Although she had been told ProAct was not a 24/7 residential institution, she believed that she worked in a 24/7 facility.

Ms. Calhoun submitted the Agency's Recruitment Posting No. 00-H171-C (effective April 1, 2000) that stated the starting salary of Psychiatric Nurse III's was \$40,291, which was admitted as Grievants' Exhibit 1, without objection. According to the job posting, the summary stated that incumbents in this class provided full performance specialized nursing care in a State psychiatric institution and/or mental health clinic. She noted that Merit Rule 5.0110 states that the pay in classified service shall be according to the published rates prescribed for the pay grade assigned. Ms. Calhoun argued that the salary in the job description should be for any Psychiatric Nurse III, not just those who are 24/7.

Additionally, Grievants submitted Recruitment Posting No. 01-H63-C (effective July 1, 2000), which was admitted as Grievants' Exhibit 2, without objection, and Recruitment Posting No. 01-H62-C (effective July 1, 2000) which was also admitted as Grievants' Exhibit 3, without objection.

John Johnson was sworn and testified that the two recruitment postings effective July 1 were corrections to the Agency's Recruitment Posting No. 00-H171-C (effective April 1, 2000) (Grievants' Exhibit 1). He testified that the two July recruitment postings were found recently on the Internet. He argued that people were applying for the initial posting and being deceived as to its announcement. Mr. Johnson testified that both postings, No. 01-H62C which dealt with non-24/7 positions and No. 01-H63C for 24/7 positions, were submitted for

comparison.

On cross-examination, Ms. Calhoun testified that ProAct is not fully staffed in three shifts at the facility. ProAct is fully staffed only for the two day shifts, with the third shift staffed by a nurse with the pager. She acknowledged that ProAct is not a 24/7 institution in the same way that Delaware Psychiatric Hospital is a 24/7 facility. She further acknowledged that a nurse on the third shift, who is on call with the pager, has freedom of movement and distance. Ms. Calhoun testified that ProAct's work was performed in the community, not at a residential institution.

Upon questioning by the Board, Ms. Calhoun testified that ProAct is a continuous treatment team facility. ProAct has a sicker population. ProAct nurses take medication to the community and assist clients. Instead of being in a facility, Ms. Calhoun assists clients in a community setting.

Upon questioning by the Board, Mr. Johnson testified that the job descriptions for each of the Grievants was the same, except he and Ms. Clough work 8:00 a.m. to 4:30 p.m., and are on-call on weekends with a pager. He and Ms. Clough can handle matters over the phone. Unlike Ms. Calhoun, he and Ms. Clough do not have to go out. Mr. Johnson also testified that Canby Park clients are more capable of taking care of themselves. Ms. Calhoun has more severe clients. Mr. Johnson sees his clients in the community during the day shift, from 8:00 a.m. to 4:30 p.m. He explained that there is no second shift and no call outs from home. He testified that he and Ms. Clough are definitely not 24/7.

Upon further questioning by the Board, Mr. Johnson testified that regardless of the language of Merit Rule 5.0712 that salaries may be leveled up, he considered the job

description and initial posting. He contended that Psych III nurses perform the same work, regardless of whether one is in a residential institution or in a community clinic. He argued that because he is a Psyche III nurse, he should be eligible for the higher salary. Mr. Johnson testified that he had transferred previously as a Psyche III nurse from Delaware Psychiatric Center. Mr. Johnson stated that when they filed the grievance, there was no mention of 24/7 in the initial recruitment. He testified that the initial posting indicated "mental health clinics."

Upon further questioning by the Board, Ms. Calhoun testified that there were a total of six nurses similarly situated to them, but only the three Grievants filed a grievance on the matter.

Martha Austin was sworn and testified on behalf of the Agency. Ms. Austin is the Deputy Director of Human Resources for the Agency. She acknowledged that there was a critical shortage of psychiatric nurses in certain residential institutions in 1999/2000. She explained there was a nationwide shortage of nurses evolving in residential institutions. Residential institutions are the least desirable environments. A similar shortage had previously occurred in 1987. Ms. Austin testified that the institutions where the critical shortage existed were 24-hour, 7-days a week residential facilities for patients who were mentally retarded, disabled and/or elderly. Twenty-four hour, 7-day institutions differed from community mental health clinics, which provided care to clients who lived in community group homes or private residences. She testified that clients in community clinics are less dependent on the Agency for nutritional and medical care. Ms. Austin explained that there is a severe impact on the budget when there is a nursing shortage in 24/7 facilities. It includes requiring nurses to work overtime or hiring agency nurses, which can be very expensive. Further, there is the lack of

continuity of care with having a different nurse covering a shift every night.

To respond to the shortage, the Agency decided to re-initiate the salary Matrix which had been originally approved during the 1987 shortage. Ms. Austin testified that under the Matrix, an employee could move up the pay scale automatically without waiting for July to get an increase. In 1987, the salary increase was approved by the State Personnel Director, the Budget Director, and the Controller General.

Ms. Austin testified that the Agency had to demonstrate that the critical shortage criteria set forth in Merit Rule 5.0712 existed before an advanced starting salary could be approved. Ms. Austin is familiar with the State of Delaware's Merit Rules. A copy of Merit Rule 5.0712 was admitted as Agency's Exhibit 1, without objection. Ms. Austin testified that the Agency sought approval for the advanced starting salaries via a memo dated February 23, 2000 addressed to the State Personnel Director, the Budget Director and the Controller General ("memo"). In the memo, the Agency sought blanket approval. The memo stated that the classification of nurses for which advanced salary approval was sought involved 24-hour, 7-day institutions, which also included Psychiatric III nurses at such institutions. A copy of the memo was admitted as Agency's Exhibit 2, without objection.

Ms. Austin also testified that Merit Rule 5.0712 does not require the Agency to level-up. Instead, the Agency has discretion to request a leveling up. According to the memo, the Agency requested a leveling-up in this case for 24/7 institutional nurses. She testified that because the request for advanced salaries was for 24/7 institutional nurses, then the leveling up would also apply to 24/7 institutional nurses. She confirmed that, according to the memo, the State Personnel Director, Budget Director and Controller General approved the request. As a

result of this approval, the Agency created Recruitment No. 00-H171C (Grievants' Exhibit 1).

Ms. Austin further testified that the summary on Recruitment No. 00-H171C did not state that it was for Psychiatric III nurses. The summary only stated that incumbents in this classification provided a particular service at certain locations. Additionally, the Agency's advertisement (last modified March 31, 2000) from the State Personnel Office's website was submitted as Agency's Exhibit 3, without objection ("advertisement"). Ms. Austin testified that this advertisement, which sought Psychiatric III nurses, named specifically the residential long-term care facilities where the recruitment efforts were directed. The facilities were Stockley Center, Delaware Psychiatric Center and Governor Bacon Health Center. The advertisement also indicated an hourly rate of \$20.66, which, when multiplied by the number of hours worked per year, equaled \$40,291.

According to Ms. Austin's knowledge, the Agency did not hire anyone, as a result of the recruitment efforts, at the higher pay rate who did not work at a 24-hour, 7-day facility. Based on her recollection, Ms. Austin testified that the Grievants did not apply for a transfer into any of the 24-hour, 7-day facilities. She further stated that the initial recruitment posting had to be re-posted when the Agency received its general salary increase in July. According to a July 20, 2000 memo, which was admitted as Agency's Exhibit 4, without objection, the Agency had to seek approval again from the State Personnel Director, the Budget Director and the Controller General for the general increase in salary. Ms. Austin testified this increase was approved in September. As the July 20, 2000 memo stated, the request applied to nurses in the listed classifications who worked in 24/7 institutions.

Upon reviewing Recruitment No's. 01-H62C and 01-H63C (Grievants' Exhibits 2 and

3), Ms. Austin testified that No. 01-H63-C was for 24-hour, 7-day institutions. This was added to correct any misunderstanding from the initial posting. She testified that the two recruitments clearly indicated differences in salaries for 24/7 and non-24/7 nurses. The reason for the difference was due to the significant number of vacancies in 24/7 positions, which are less desirable and difficult to recruit. Ms. Austin testified that the Agency did not have such problems in the 5-day a week operations.

Ms. Austin also testified that the salaries announced in the recruitment postings are not the same as the published rate for a pay plan. The published rate is the rate that the General Assembly and the Governor approve every year in the Agency's budget. The recruitment postings were announcements for an advanced salary previously approved by necessary State officials.

Upon questioning by the Grievants, Ms. Austin testified that the vacancy rate for the Psyche III nurse position varies, depending upon the turnover rate. Mr. Johnson stated that he applied for a position at Delaware Psychiatric Center, for which he has not been contacted. Ms. Austin testified that she understood Mr. Johnson had said he would not return to Delaware Psychiatric Center. Ms. Austin testified that its been the Agency's experience that days shift community positions are easier to fill than midnight or 3-11 shifts in a residential institution where work is required on weekends and holidays and the client is more demanding. In response to a question by Ms. Clough, Ms. Austin anticipated that the Agency would bring future nursing shortages to the Nurse Recruitment Task Force and develop strategies to address the shortages. Ms. Austin further testified that clients in residential institutions require a different type of care than clients in community clinics. In residential institutions, the Agency

must provide a client's nourishment, medical needs, and changing diapers. Residential institutions are less desirable than community clinics where clients function better physically.

Upon questioning by the Board, Ms. Austin testified that a nurse, on a lateral transfer from a 24/7 to a non-24/7 facility, would retain the 24/7 salary. She further stated that at the time the Agency developed its advertisement, there were no vacancies in the community clinics. The listings on the advertisement included all of the vacancies, which were only in residential, 24/7 institutions.

In closing, Ms. Calhoun argued that her responsibilities as a community Psyche III nurse are equivalent to those of a Psyche III nurse working in a 24-hour, 7-day institution. She argued that the initial posting (Grievants' Exhibit 1) did not distinguish between 24/7 and non-24/7 institutions, so she felt she was entitled to the higher salary. In closing, Ms. Clough argued that it did not make any sense to transfer to a 24/7 position, simply to get a higher salary and then try to return to one's old job. She thought it would be more cost effective to also give community clinic Psyche III nurses the higher salary. In his closing argument, Mr. Johnson argued that most of his community clients are discharged from Delaware Psychiatric Center. He also argued that the initial posting was a mistake, and therefore, the higher salary should be honored for all nurses.

In closing, the Agency argued that it was not implying that the services provided by nurses in community clinics were to be devalued. The quality of care between residential and community clinic nurses was not the issue. The Agency argued that it was faced with addressing shortages in its 24/7 residential institutions. The Agency argued that the advanced salary was available for a specific group of people. The posting did not say it applied for all

Psychiatric III nurses. The Agency further argued that the Grievants did not change their position in reliance on the posting by transferring to a 24/7 institution.

### THE LAW

#### **29 Del.C. §5916.**

"(a) The rules shall provide for a pay plan for all employees in the classified service, after consultation with state officers and after a public hearing held by the Board. Such pay plan shall become effective only after it has been approved by the Governor after submission to the Governor by the board and after adequate appropriations to put such plan into effect have been received. ..."

#### **Merit Rule, Chapter 4.0000 Pay Schedules**

"Pay schedules based on current legislation will be issued by the [State Personnel] Director, in accordance with 29 Del.C. §5916."

#### **Merit Rule No. 5.0100 Pay Grades and Rates**

"Each position classification in the list of class titles shall have assigned to it a paygrade for compensation purposes."

#### **Merit Rule No. 5.0110**

"The pay of employees occupying positions in the classified service shall be according to the published rates prescribed for the paygrades assigned."

#### **Merit Rule No. 5.0712**

"The appointing authority may request, and the State Personnel Director may approve, a starting rate higher than the minimum for the paygrade where a critical shortage of applicants exists. The State Personnel Director, in concurrence with the State Budget Director and the

Controller General, after specifying all equally qualified incumbents of the same classification within the same geographic area receiving a lower rate, may provide that these employees shall also have their rates increased to the rate established for entrance if their performance is satisfactory."

### DISCUSSION, FINDINGS AND CONCLUSIONS

Grievants argue that, as Psychiatric III nurses in the Agency's Division of Alcoholism, Drug Abuse and Mental Health, they should have been paid commensurate with the advanced starting salaries paid to Psychiatric III nurses working in 24-hour, 7-day institutions in the Agency. Grievants contend this was a violation of Merit Rule 5.0110. The burden of proof is upon Grievants to establish such violations. 29 Del.C. §10125(c); Thomson v. Dept. of Transportation, Del. Supr., No. 3, 1988, Horsey, J., 1988 WL 61554 (May 19, 1988) (ORDER). The Board, by unanimous vote of the members hearing this matter, finds that Grievants have not met their burden of establishing a violation of the Merit Rules or law which would permit the Board to grant such relief and therefore, their appeal must be denied and dismissed.

Merit Rule 5.0110 requires that "the pay of employees occupying positions in the classified service shall be according to the published rates prescribed for the paygrades assigned." Additionally, Merit Rule, Chapter 4.0000 provides that "pay schedules based on current legislation will be issued by the [State Personnel] Director, in accordance with 29 Del.C. §5916." 29 Del.C. §5916 requires that a pay schedule is only effective once approved by the Governor.

Grievants argue that the "published rates" for their positions are the advanced starting

salaries contained in the initial recruitment notice. However, this argument overlooks the provisions of 29 Del.C. §5916. Assigned paygrades can only change when there is a modification to the uniform pay plan, which can be made only with approval by the Governor and in accordance with 29 Del.C. §5916. According to the facts presented, there were no changes to the pay plan. Ms. Austin testified that the salaries announced in the recruitment postings were not the same as the published rate for a pay plan. The published rate is the rate that the General Assembly and the Governor approve every year in the Agency's budget. The recruitment postings were announcements for an advanced salary previously approved by necessary State officials. As such, there was no change to the "published rates for the paygrades assigned," as stated in Merit Rule 5.0110.

Additionally, Grievants argue that they were automatically entitled to the higher salary. This argument overlooks Merit Rule 5.0712 (Agency's Exhibit 1). Rule 5.0712 states, "[t]he appointing authority may request, and the State Personnel Director may approve, a starting rate higher than the minimum for the paygrade where a critical shortage of applicants exists. The State Personnel Director, in concurrence with the State Budget Director and the Controller General, after specifying all equally qualified incumbents of the same classification within the same geographic area receiving a lower rate, may provide that these employees shall also have their rates increased to the rate established for entrance if their performance is satisfactory." (emphasis added). Applying general principles of statutory construction, the language of this rule indicates an agency is afforded discretion to request, or not to request, an advanced starting salary where a critical shortage of applicants exists.

As a preliminary issue, it is necessary to address whether a critical shortage existed in

order to support the Agency's request for higher salaries. The evidence in the record showed that there was a critical shortage of nurses in residential, 24/7 institutions, in 1999/2000. Ms. Austin testified that there was a nationwide shortage of nurses evolving in residential institutions. A similar shortage had occurred in 1987, which resulted in the Agency implementing a salary Matrix that allowed increased salaries that were advanced before the general salary increase in July. She also testified that nursing shortages in 24/7 institutions lead to increased overtime or hiring agency nurses, which resulted in severe budgetary problems. There was evidence from the Agency that 24/7 facilities were less desirable than community clinics because the clients were more demanding of care.

In order to address the existing critical shortage, the Agency requested approval of advanced salaries for "24-hour, 7-day operations," as evidenced by its February 23, 2000 memo (Agency's Exhibit 2). A request for approval of advanced starting salaries is within an agency's discretion, per Merit Rule 5.0712.

The February 23, 2000 memo stated that the classification of nurses for which the advanced salary approval was sought involved 24-hour, 7-day institutions, which included Psychiatric III nurses at such institutions. The memo sought blanket approval. The evidence indicates that each Grievant works in a community, not a residential or 24-hour, 7-day, clinic. Mr. Johnson testified that he and Ms. Clough, who both work at Canby Park, could handle matters over the phone and did not have to go out. Canby Park residents are more capable of caring for themselves. Mr. Johnson acknowledged that he and Ms. Clough were not 24/7. Similarly, Ms. Calhoun testified that ProAct, where she works, is not fully staffed in three shifts. Instead, the third shift is staffed by a nurse with a pager who has freedom of movement

and distance. Ms. Calhoun acknowledged that ProAct is not a 24/7 institution the same way that Delaware Psychiatric Hospital is a 24/7 facility.

Further, the evidence showed that an Agency advertisement (last modified March 31, 2000) that was posted on the State Personnel Office's website (Agency Exhibit 3) sought Psychiatric III nurses at Stockley Center, Delaware Psychiatric Center and Governor Bacon Health Center. These facilities are residential, long-term care, 24/7 facilities. The evidence indicates there were no other vacancies in other facilities, including community clinics. The advertisement stated a starting hourly rate of \$20.66. According to Ms. Austin, this hourly rate, when multiplied by the annual hours worked, supported the salary of \$40,291 advertised in the initial posting, Recruitment No. 00-H171C (effective April 1, 2000) (Grievants' Exhibit 1).

Also, according to the February 23, 2000 memo, the Agency sought leveling-up for 24/7 institutional nurses. Merit Rule 5.0712 also affords an agency discretion in that an agency may request a leveling up for current employees of the same classification when starting rates for new employees are higher than the minimum. The evidence indicates that because the Agency's request for advanced salaries was for 24/7 institutional nurses, then the leveling up would also apply to 24/7 institutional nurses.

Based upon the Agency's request, which was approved, Recruitment No. 00-H171C (Grievant's Exhibit 1) was initially posted. The evidence in the record indicates that this recruitment did not state the posting was for Psychiatric III nurses. Grievants argue that this recruitment notice did not state it was for 24/7 institutions and, therefore, the higher salary should apply to all nurses.

To support their argument that the initial recruitment posting applied to all Psychiatric III nurses, Grievants also submitted two recruitment postings (effective July 1, 2000), that distinguished 24/7 and non-24/7 positions (Grievants' Exhibits 2 and 3). However, the evidence in the record indicates that the distinction in the two postings was added to avoid misunderstanding from the initial posting. The two recruitment postings in July 2000 clearly indicated different salaries between 24/7 and non-24/7 positions. Ms. Austin testified that the reason for the salary difference was due to the significant number of vacancies in 24/7 positions.

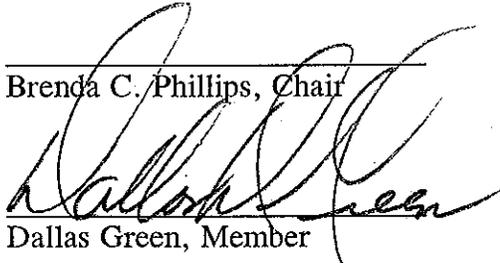
According to the provisions of Merit Rule 5.0712, an agency has discretion to request approval for a higher salary or to request a leveling up. In this case, the Agency chose to exercise that discretion. Grievants have not shown by a preponderance of the evidence that they are automatically entitled to the higher salary or that the Agency was required to pay them the higher salary. In reaching this decision, the Board is not devaluing the importance of non-24/7 nurses and the substantial contributions they make to their clients and the community.

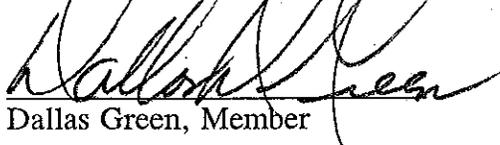
When considering the evidence in the record, the Board finds Grievants did not meet their burden of proof, by a preponderance of the evidence. The Board further finds that the Agency's actions to seek advanced starting salaries because of a critical shortage in 24/7 institutions was discretionary, pursuant to Merit Rule 5.0712.

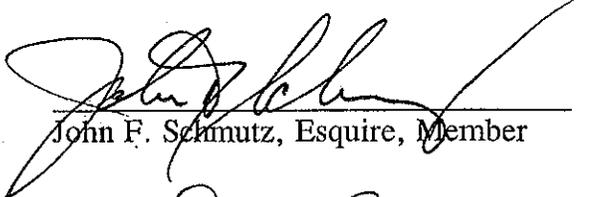
ORDER

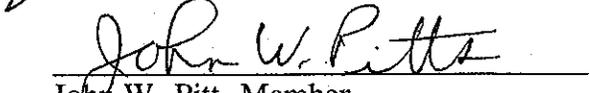
For the foregoing reasons, the Board approves the Step Three grievance decision and denies this grievance appeal.

IT IS SO ORDERED this 21<sup>st</sup> day of February, 2001.

  
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Brenda C. Phillips, Chair

  
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Dallas Green, Member

  
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John F. Schmutz, Esquire, Member

  
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John W. Pitt, Member

## APPEAL RIGHTS

29 Del. C. §5949 provides that the grievant shall have a right of appeal to the Superior Court on the question of whether the appointing agency acted in accordance with law. The burden of proof of any such appeal to the Superior Court is on the grievant. All appeals to the Superior Court are to be filed within thirty (30) days of the employee being notified of the final action of the Board.

29 Del.C. §10142 provides:

(a) Any party against who a case decision has been decided may appeal such decision to the Court.

(b) The appeal shall be filed within thirty (30) days of the day the notice of the decision was mailed.

(c) The appeal shall be on the record without a trial de novo. If the Court determines that the record is insufficient for its review, it shall remand the case to the agency for further proceedings on the record.

(d) The Court, when factual determinations are at issue, shall take due account of the experience and specialized competence of the agency and of the purposes of the basic law under the agency has acted. The Court's review, in the absence of actual fraud, shall be limited to a determination of whether the agency's decision was supported by substantial evidence on the record before the agency.

Mailing Date:

2/22/01

Distribution:

Original: File

Copies: Grievants

Agency's Representative